The Impact of *Jackson v. Birmingham Board of Education* on Laws Governing California's School Employees

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I. INTRODUCTION

In March 2005, the United States Supreme Court ruled in *Jackson v. Birmingham Board of Education* that Title IX of the Education Amendments of 1972 ("Title IX") protects "whistleblowers" against retaliation for complaining about gender discrimination against others by educational entities receiving federal funds.[1] This decision may have implications for interpretation of California's similar laws covering recipients of state educational funding.[2] Moreover, California's Whistleblower Protection Act[3] adds a wrinkle to this issue that is not found under federal anti-discrimination law. This essay examines the Supreme Court's *Jackson* decision, its effect on current California law prohibiting gender discrimination, how the Whistleblower Protection Act fits in this picture and accordingly whether amendments to any of these state laws are necessary or desirable in light of *Jackson*.

II. *JACKSON V. BIRMINGHAM BOARD OF EDUCATION*

In 1993, Roderick Jackson was hired as a physical education teacher and girls' basketball coach in the Birmingham public school district.[4] After transferring to Ensley High School in 1999, Jackson began complaining to the school board about the girls' team's lack of access to "funding, equipment and facilities."[5] The Board took no action on Jackson's complaints, but he soon began to receive poor performance reviews and was removed as the girls' basketball coach in 2001, though he retained his teaching position.[6] In his subsequent lawsuit against the Board

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for loss of his coaching position, both the district court and the Court of Appeals for the Eleventh Circuit held Jackson "fail[ed] to state a claim upon which relief can be granted"[7] because Title IX does not provide "a private right of action for retaliation."[8]

Writing for a 5-4 court, Justice Sandra Day O'Connor first noted the Court has recognized a private right of action for sexual harassment under Title IX on the ground the statutory language "on the basis of sex" applies to all forms of intentional sex discrimination.[9] Following a similar textual analysis, the Court found that retaliation was discrimination under the statute because "the complainant is being subjected to differential treatment" compared to other employees.[10] Retaliation against one who complains of gender discrimination is thus discrimination "on the basis of sex," the Court said, because the nature of the complaint, gender inequality, prompted the intentional differential treatment of the complainant.[11] In short, Jackson was discriminated against based not on his sex but by the fact that his complaint involved differential treatment based on gender, which led to an intentional act against Jackson, his dismissal as the girls' basketball coach.

Underlying the Court's textual interpretation of Title IX was Congress' intent for the statute to protect individuals against gender discrimination.[12] The Court observed that if witnesses are afraid to report gender discrimination due to fear of retaliation, many incidents, particularly those involving children, would go unreported because the victim is either unaware of the law or unable to bring the claim herself.[13] Moreover, as the Court noted, individual reporting is necessary to satisfy the "actual notice" element of a Title IX violation.[14] If a witness was afraid to give such notice, the funding recipient would be off the hook for the discriminatory conduct. Thus, the Court said, a private right of action for retaliation is necessary to protect Title IX's enforcement scheme and serve Congress' purpose in enacting the statute.[15]

III. California Anti-Discrimination Law

Sections 220 and 66270 of the California Education Code are similar to Title IX. Each provides that an educational institution receiving state financial assistance may not discriminate "on the basis of sex."[16] Unfortunately, case law interpreting these sections is scant. In the only case addressing whether Section 220 provides a private right of action, *Nicole M. v. Martinez Unified School District*,[17] the United States District Court for the Northern District of California declined to decide the issue because the plaintiff had a private right of action under California's Unruh Civil Rights Act[18] and federal law.[19] In an unpublished opinion, *Sandra V. v. California Institute of the Arts*,[20] the California Court of Appeal for the Second District addressed a retaliation claim under section 66270. The plaintiff filed a sexual harassment claim against a faculty member and was then subjected to retaliatory threats by the professor and his family.[21] However, though the threats, like Jackson's dismissal as coach, were motivated by a claim of sex discrimination, the court held Sandra V. failed to state a claim because she insufficiently alleged that the school failed to respond to Sandra's complaint because of her sex.[22]

Despite the paucity of judicial decisions interpreting these gender equity provisions, a key to *Jackson*'s impact on them is found in the statutory sections stating the policy and legislative intent behind the provisions. Both provisions declare it the state's policy that all public school students shall be afforded "equal rights and opportunities."[23] More importantly here, the legislature explicitly declared that the provisions "be interpreted as consistent with . . . Title IX of the Education Amendments of 1972."[24] This requirement is merely a codification of the existing practice of California's courts in looking to similarly worded federal law to interpret state anti-discrimination laws.[25] Thus, it appears that if the issue came before a California court under these Education Code sections, whose language is identical to Title IX,[26] a private right of

action against a recipient based on retaliation for complaining about sexual discrimination against another would be recognized. In other words, California courts would, based on their practice and the specific legislative intent codified in Education Code Sections 201(g) and 66251(g), interpret these gender equity provisions to include the right recognized by the federal Supreme Court in *Jackson*.

IV. California's Whistleblower Protection Law

The wholesale importation of *Jackson* into California law is complicated somewhat by the recently enacted Whistleblower Protection Act, a statute with no analogue in federal law. The Act provides for a civil penalty of up to $10,000 and up to a year in jail for "[a]ny person who intentionally engages in acts of reprisal, retaliation, threats, coercion or similar acts" against a state employee who reports "improper governmental activity."[27] Such improper activity, as defined in the Act, occurs when a state agency or its employee engages in conduct that "is in violation of any state or federal law or regulation."[28] Though the Act explicitly lists conduct such as "corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty" as improper, the list is not exhaustive.[29] Therefore failure to comply with federal or state law prohibiting public schools from discriminating based on gender would likely fall under the statutory definition of "improper governmental activity."

If we accept this proposition, then *Jackson* has no effect at all on California law because a public school employee who reports alleged gender discrimination by the school is already protected under the Whistleblower Protection Act. However, it is unclear whether the Act provides the broad protection granted in *Jackson*. For one thing, the Act does not seem to be aimed at preventing discrimination by state agencies. The legislative declarations state the Act is

intended to encourage reporting of "waste, fraud, abuse of authority, violation of law, or threat to public health."[30] Moreover, the listed improper governmental activities are those involving abuse of authority, fraud or waste of state resources.[31] While failing to comply with state anti-discrimination law would certainly be a "violation of law," given the focus on corrupt and wasteful conduct in the statutory language, it is possible that failure to comply falls outside the Act's scope. Additionally, failure to treat one sex equally, such as by giving less money to girls' athletics, actually saves state resources and thus is substantively different from the practices explicitly named in the Act.

Another factor that may narrow the Act's protection compared to *Jackson* is the ambiguity over to whom the state employee may report the alleged activity. The Act gives the State Auditor authority to investigate disclosures of alleged improper governmental activity.[32] One commentator has presumed based on this grant that disclosure must be made to the State Auditor for the employee to receive the Act's protection against retaliation.[33] However, the Act does not grant the State Auditor power to enforce the Act[34] nor does it diminish the authority of other state agencies, including the Attorney General, to investigate alleged improper governmental activity.[35] Based on this language, it could be argued that the employee may report the activity to any state agency that could investigate it. The scope of reporting is crucial to analyzing *Jackson*'s impact because if all reports must be made to the State Auditor, then an employee like Jackson who reports the alleged discrimination to his employer, the school board, would not be protected by the Act. Unfortunately, this issue has not yet been litigated nor has the legislature clarified it by amendment. For these reasons, California's Whistleblower Protection Act does not clearly provide public school employees with the same protection as *Jackson*.

V. Changes to California Law?

Based on the above considerations, the California Legislature has three options from which to choose in dealing with the *Jackson* decision. The first is to do nothing, leaving the effect of *Jackson* on California law to be determined by the state courts. Given the legislature's mandate that the Education Code's gender equity provisions be interpreted consistently with Title IX,[36] it is almost certain that under those code sections the courts would find a private right of action for retaliation identical to that in *Jackson*. However, this legislative directive may prove to be a double-edged sword. *Jackson* was a 5-4 decision along the current Supreme Court's typical lines of cleavage, with Justice O'Connor providing the swing vote in favor of finding the private right of action.[37] Now that she has announced her retirement, it is unknown whether her replacement will be as sympathetic to women's rights issues as Justice O'Connor has proven to be.[38] Thus, the Court may soon have enough votes to overturn *Jackson* should the opportunity arise, particularly if it can be done before there is widespread reliance on the decision.[39] If this happens, under the California legislature's interpretive command for the Education Code, the state's courts would similarly have to abandon the private right of action against public schools for retaliation in response to complaints about gender discrimination.

The second option is for the legislature to amend the Whistleblower Protection Act to explicitly provide coverage for employees who report gender discrimination by public agencies or their employees. While it would be possible to imply such coverage from the statute's existing language, on balance it appears the Act was not intended to be an enforcement mechanism for state antidiscrimination laws but rather a way to discourage corruption and waste in state government.[40] Nonetheless, the legislature could certainly expand the Act's coverage to apply to cases like *Jackson*. Though such an expansion would provide statutory *Jackson* protection to

public school employees, it might be overlooked by attorneys and public officials searching the Education Code for such provisions and, moreover, would place the responsibility for addressing retaliation claims with an agency, the State Auditor, which is ill equipped to address those claims.[41]

The third option is for the legislature to amend Education Code Sections 220 and 66270 to explicitly provide the *Jackson* right of action. This could easily be done by adopting the retaliation provision that currently exists under the Fair Employment and Housing Act, which makes it unlawful "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part."[42] Putting whistleblower protection directly in the Education Code's gender equity provisions has two advantages. First, those provisions are the natural place for such protection to be located. Logically constructing the statute in this way would save both attorneys and state officials considerable time by not forcing them to hunt through various code sections looking for the appropriate whistleblower protection. Additionally, investigative and enforcement power could be granted to the Department of Fair Employment and Housing, the state agency most naturally equipped to deal with retaliation claims. Second, an explicit retaliation provision would preclude the argument raised by the *Jackson* dissent that if the legislature wanted to provide for a private right of action for retaliation it would have explicitly done so based on the fact that it had done so in the employment discrimination statute.[43] In other words, the tenuous nature of an implied right of action would be eliminated. On balance, this third option would be preferable to the other two because it would clearly provide California's public school employees with a remedy for retaliation based on their

reporting of gender discrimination against others. In turn, this would further the legislature's objective of providing "equal rights and opportunities" in California's public schools.[44]

VI. CONCLUSION

The *Jackson* decision provides an opportunity for California courts to recognize a private right of action for retaliation against a person who complains about gender discrimination by a public school. However, given the tenuous nature of the Supreme Court's decision and the susceptibility of implied rights of action to judicial reconstruction, the California legislature should take a proactive approach by codifying *Jackson*'s holding in the Education Code sections providing for gender equity in the state's public schools. In doing so, the legislature will clearly guarantee a right that is necessary for adequate and proper enforcement of the state's antidiscrimination laws.

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1. 125 S.Ct. 1497, 1504.
2. CAL. EDUC. CODE §§ 200 et seq. (2003) (primary and secondary schools), 66250 et seq. (postsecondary schools).
3. CAL. GOV'T. CODE § 8547 et seq. (2005).
4. *Jackson*, 125 S.Ct. at 1502.
5. *Id.*
6. *Id.*
7. FED. R. CIV. P. 12(b)(6).
8. *Jackson*, 125 S.Ct. at 1503.
9. *Id.* at 1504.
10. *Id.*
11. *Id.* The dissent rejected this reading of Title IX's text, asserting "on the basis of sex" is shorthand for the phrase "on the basis of the plaintiff's sex." *Id.* (Thomas, J.., dissenting) at 1511 (citing Title VII's language "on the basis of the individual's sex"). Nonetheless the majority found that Congress consciously used broad language in Title IX to provide a private right of action for those who complain about discrimination against others. *Id.* at 1507 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969)).
12. *Id.* at 1508 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 667, 704 (1979)).
13. *Id.*
14. *Id.*
15. *See id.* (observing "if retaliation were not prohibited, Title IX's enforcement scheme would unravel").
16. CAL. EDUC. CODE §§ 220, 66270. Section 220 applies to elementary and secondary schools. Section 66270 to postsecondary schools. However, the sections' language is identical.
17. 964 F. Supp. 1369 (N.D. Cal. 1997).
18. Cal. Civ. Code § 51 et seq.
19. *Nicole M.*, 964 F. Supp. at 1390.
20. No. B155508, 2003 WL 21766253 (Cal. Ct. App. July 31, 2003).
21. *Sandra V.*, 2003 WL 21766253 at *2.
22. *Id.* at *6.

[23] CAL. EDUC. CODE §§ 200, 66251.

[24] *Id*., §§ 201(g), 66251(g).

[25] *See Reno v. Baird*, 18 Cal. 4th 640, 647 (Cal. 1998) ("Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA." (quoting Janken v. GM Hughes Electronics, 53 Cal. Rptr. 2d 741, 747 (Cal. Ct. App. 1996))).

[26] *Compare* CAL. EDUC. CODE § 220 ("No person shall be subject to discrimination *on the basis of sex*") *with* 20 U.S.C. § 1681 ("No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance") (emphasis added).

[27] CAL. GOV'T CODE § 8547.8(b) (2005).

[28] *Id*. § 8547.2(b)(1).

[29] *Id.* § 8547.2(b)(1) (preceding list of activities with "including, but not limited to").

[30] *Id.* § 8547.1.

[31] *Id.* § 8547.2(b)(2).

[32] *Id.* § 8547.4 ("The State Auditor shall administer the provisions of this article and shall investigate and report on improper governmental activities.").

[33] Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere)*, 25 WHITTIER L. REV. 21, 31 (2003).

[34] CAL. GOV'T CODE § 8547.7(b).

[35] *Id*. § 8547.7(d).

[36] CAL. EDUC. CODE §§ 201(g), 66251(g).

[37] Justice O'Connor's majority opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer while Justice Thomas' dissenting opinion was joined by the Chief Justice and Justices Scalia and Kennedy. *Jackson*, 125 S.Ct. at 1501, 1510 (Thomas, J. dissenting).

[38] On July 1, 2005, Justice Sandra Day O'Connor announced her retirement from the United States Supreme Court. http://en.wikipedia.org/wiki/Image:Oconnor070105_0001.jpg. On July 19, 2005, John G. Roberts, Judge on the United States Court of Appeals for the District of Columbia Circuit, was nominated by President George W. Bush to fill the vacancy on the Supreme Court left by the retirement of Justice O'Connor. http://en.wikipedia.org/wiki/John_G._Roberts_Jr.

[39] *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 855-56 (1992) (declining to overturn Roe v. Wade, 410 U.S. 113 (1973), because "the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case [cannot] be dismissed").

[40] *See supra* Part IV. (discussing the Act's focus on corruption and wasteful conduct by state agencies and employees).

[41] *Cf.* Secretary's Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65007-65009 (Oct. 10, 2002) (delegating responsibility for whistleblower retaliation claims brought under section 806 of the Sarbanes-Oxley Act to the federal Occupational Safety and Health Administration).

[42] CAL. GOV'T CODE § 12940(h) (2005).

[43] *Jackson*, 125 S. Ct. at 1513 (Thomas, J., dissenting).

[44] CAL. EDUC. CODE §§ 200, 66251.